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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM 1991

HERBERT S. WALDMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Is a charge of conspiracy to defraud the United States, under 18 U.S.C. § 371, governed by the five-year statute of limitations under U.S.C. § 3282, as held previously by the Supreme Court of the United States, or by the six-year statute of limitations under the Internal Revenue Code?

II. Does the government, in a case arising under 18 U.S.C. § 371 and 7206(2) of the Internal Revenue Code, legally meet its burden of proof of the essential element of willfulness when it fails to produce <u>any</u> independent evidence that the defendant knew the funds at issue were untaxed, and when it does not dispute that the defendant never saw, prepared or counseled the preparation of the tax returns

at issue?[1]

III. Does a trial court commit reversible error by failing to instruct the jury on an essential element of the charged offense, despite being presented with a correct proposed instruction, despite arguing, in the charge conference to instruct on the essential element and despite interrupting defense counsel on that point during the defense's exception to the court's jury instruction?

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[1]A subsidiary question argued in the Eleventh Circuit Court of Appeals and herein is whether or not the standard of review utilized by the Eleventh Circuit Court of Appeals, upon this issue, is contrary to the standards set forth in Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314 (1959); United States v. Pritchett, 908 F.2d 816 (11th Cir. 1990); United States v. Krasovich, 819 F.2d 253 (9th Cir. 1987).

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REPORT OF OPINION OF THE ELEVENTH CIRCUIT

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 941 F.2d 1544 (11th Cir. 1991). Rehearing en banc was denied on December 18, 1991. (See Appendix "A").

SUPREME COURT JURISDICTION

The conviction of Petitioner, Herbert S. Waldman, was affirmed by the United States Court of Appeals for the Eleventh Circuit on September 18, 1991. Rehearing en banc was denied on December 18, 1991. This Court's jurisdiction to review the Court of Appeals' decision is conferred by 28 U.S.C. § 1254 (1).

STATUTES INVOLVED IN THE CASE

18 U.S.C. § 371. **Conspiracy to commit offense or to defraud United States.**

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

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18 U.S.C. § 3282. **Offenses not capital.**

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished

for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

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26 U.S.C. § 6531. **Periods of limitation on criminal prosecutions.**

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years after the commission of the offense, except that the period
of limitation shall be 6 years --

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation of or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States); and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without

the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended under the date is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable.

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26 U.S.C. Sec. 7206. **Fraud and false statements.**

Any person who --

(1) **Declaration under penalties of perjury.** Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that

it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) **Aid or assistance.** Willfully aids or assists in, or procures, counsel, or advised the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) **Fraudulent bonds, permits, and entries.** Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed,

or advises, aids in, or connives at such execution thereof; or

(4) **Removal or concealment with intent to defraud.** Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) **Compromises and closing agreements.** In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully--

(A) Concealment of property. Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person

liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records. Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation) or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF PROCEEDINGS AND DISPOSITION

On or about March 23, 1990, Waldman was indicted for one count of conspiring to defraud the United States by impeding and impairing the Internal Revenue Service in violation of 18 U.S.C. section 371[1] and conspiring to commit an offense against the United States by assisting in the preparation of false tax returns in violation of 26 U.S.C. section 7206(2)[2], and two counts of assisting in Tax Return Perjury in violation of 26 U.S.C. section 7206(2). On June 5, 1990, Waldman was convicted on a general verdict of all three counts of the indictment. Waldman was sentenced to a term of 3 years of imprisonment on Count One, and terms of 3 years of imprisonment on Counts Two and

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[1]The statutory offense of conspiring to defraud the United States under 18 U.S.C. § 371 was construed to include activity which impedes the Internal Revenue Service in the performance of its duties in United States v. Klein, 247 F.2d 908, 916 (2d Cir. 1957), cert. denied, 335 U.S. 924 (1958). In that context, the offense is generally referred to as a Klein conspiracy.

[2]The willful making and filing of false tax returns is referred to herein as Tax Return Perjury and is prohibited by 26 U.S.C. § 7206(1). Assisting in Tax Return Perjury is prohibited by 26 U.S.C. § 7206(2).

Three.

It is from the Panel Opinion of the Elevent Circuit affirming the conviction that th Petitioner now seeks a Writ of Certiorari.

STATEMENT OF FACTS

In the latter part of 1979, Waldman received telephone call from Gary Beller, a well-know Atlanta real estate developer, who told Waldma that he would like him to meet with Earl Griffi for the purpose of representing Griffin on a numbe of real estate investments. (R. II, 66-67; R. V 649). Earl Griffin told Waldman that he had wo some money gambling and that he would like t invest in two shopping centers with Gary Beller (R. II, 68-69 and R. V, 650). Contrary to hi representation, and unknown to Waldman, Ear Griffin had actually earned his money fro marijuana importation. (R. II, 64-65). Ear Griffin testified he did not tell Waldman that hi funds were illegal and actually derived from th importation of marijuana in South Florida. (R. II

63-65 and 69). Griffin told Waldman that he knew of friends who had corporations in Europe and that he desired to structure his investments to minimize tax consequences. (R. II, 85; R. V, 650; R. VI, 826). Waldman told Earl Griffin that he was not a tax attorney and that he would have to research the matter of foreign corporations. (R. II, 89 and 106; R. III, 267, 294 and 355; R. V, 650-51). (R. V, 651).

Earl Griffin was a resident of the Florida Keys who had become involved in marijuana importation in the late 1970's. (R. II, 63).[3] Earl Griffin supplied information to marijuana distributors regarding the location of Coast Guard and U.S. Customs authorities. Working with members

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[3] The Government has alleged that known members of the conspiracy charged in Count One of the indictment are Mike Griffin, Susan Griffin, Earl Griffin, Richard Helton (Mike Griffin's brother-in-law), Waldman and Ronald Herman. (R. I, 15). Mike Griffin previously pled guilty to a charge of conspiracy to launder money and a charge of filing a false tax return with respect to his 1979 income tax return. (R. IV, 381 and 518). As of this date, Susan Griffin, Earl Griffin and Richard Helton have never been prosecuted for any offense for their marijuana importation, money laundering and income tax returns and have not been assessed any additional income taxes for their activity. The Trial Court determined that Ron Herman was not a co-conspirator.

of the local sheriff's office, Earl Griffin woul inform the distributors where they could brin their boats ashore and temporarily store marijuan for future distribution. (R. II, 63-64). Throug his involvement in the marijuana operation, Ear Griffin received over $1,000,000 dollars in cash (R. II, 65). Griffin decided that he wanted t invest some of this money, and he traveled t Atlanta to meet with Buddy Pender. (R. II, 66) Buddy Pender worked in the real estate business i the Atlanta area, and through his relationship wit Pender, Earl Griffin met Gary Beller. (R. II, 66 67). Beller and Griffin discussed certain shoppin center projects near Newnan, Georgia, an Gainesville, Georgia, and Griffin indicated that h needed an attorney to advise him on busines dealings with Beller. (R. II, 67). Mr. Belle recommended that Earl Griffin meet with Her Waldman. (R. II, 67).

Recognizing his rather limited knowledge o tax law and total inexperience with internationa

corporate law, Waldman researched foreign corporations and reviewed a directory of international lawyers. He sought a firm in the directory which specialized in corporate law and contacted a law firm in Liechtenstein headed by Dr. Herbert Batliner. (R. III, 190-91; R. V, 653). Waldman was referred to Alex Wiederkehr, an attorney in the firm, and he spoke to Mr. Wiederkehr about foreign corporations. Wiederkehr testified that the main activity of his law firm is to establish corporations and trusts for private clients from all over the world and that his firm handles literally thousands of such companies. (R. III, 159 and 188). Mr. Wiederkehr also testified that his firm frequently organized corporations, the stock of which was owned by trusts, that such corporations made investments throughout the world, and that all of the corporations which he organized in this case were established according to his normal practice. (R. III, 160, 188). Accordingly, the trusts and corporations were valid legal

entities under the law of Liechtenstein. (R. III, 191-92).

Waldman next contacted Sol Spielberg, a senior partner of the accounting firm of Spielberg and Herman. (R. II, 97-99). Mr. Spielberg had expertise in the field of taxation of foreign corporations, and attorneys frequently consulted with him on such matters. (R. II, 99 and 102). Spielberg conducted some research on foreign corporations and prepared a memorandum to document his research. (G90). On the basis of the information supplied by Mr. Wiederkehr and Mr. Spielberg, Waldman again met with Earl Griffin and reported that a foreign corporation could be established with a wholly owned Georgia subsidiary corporation. (R. II, 69; R. V, 655). Earl Griffin approved the corporate structure, and Waldman drafted a trust agreement on the basis of a form previously submitted to him by Wiederkehr. (R. III, 193-94; R. V, 655-56; G3). Waldman also referred Earl Griffin to the accounting firm of Spielberg

and Herman for tax and accounting advice in connection with these transactions. (R. II, 89 and 107; R. V, 653 and 657).

After meeting with Earl Griffin, reviewing Mr. Spielberg's research, talking with Mr. Wiederkehr and reviewing his materials, Waldman submitted the proposed corporate structure to Sol Spielberg for his review and approval. (R. II, 101-103; R. V, 657-61; G123). Mr. Spielberg and Earl Griffin approved the proposed structure. (R. V, 655, 658 and 661). On the basis of this advice, Waldman transmitted information to Wiederkehr, who formed PDC Politur, a Liechtenstein corporation, and Waldman formed Politur Development Corporation, a Georgia corporation and the wholly owned subsidiary of the foreign corporation ("Georgia Politur"). (R. III, 164; R. V, 658; G300 and G362). According to Wiederkehr, the stock of PDC Politur was owned by a Liechtenstein trust, with members of his firm as trustees. (R. III, 165-67; G362). Wiederkehr also testified that his firm <u>required</u> written

instructions from Waldman to act on behalf of the Liechtenstein corporations which his firm had established and maintained. [R. III, 189).

In his second or third meeting with Waldman, Earl Griffin delivered approximately $200,000 in time and date stamped bank wrappers from the Islamorada Bank to fund PDC Politur. (R. II, 71; R. V, 663-67; D10). Waldman, surprised to see cash, specifically asked Earl Griffin whether the funds were the proceeds of illegal drug activity.[4] Earl Griffin denied that the funds had anything to do with drugs or any illegal activity. (R. V, 665-66). In the course of this conversation, Earl Griffin told Waldman to call the sheriff in his hometown of Islamorada, Florida, for a reference. Waldman checked this reference and was told that Earl Griffin was a respected citizen who served on the

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[4] It should be noted that there were no money laundering statutes in effect at this time.

zoning board. (R. II, 83-84; R. V, 667-68).[5]

Waldman took Earl Griffin's funds to Europe and met with Alex Wiederkehr to deposit the money to fund the Liechtenstein corporation. According to Wiederkehr, it was not at all unusual for clients and their representatives to deliver funds in cash to deposit in Liechtenstein. These funds were then used to invest in real estate transactions with Gary Beller, specifically two shopping centers known as West Side Plaza in Newnan, Georgia and West Side Plaza in Gainesville, Georgia. (R. II, 73; R. V, 668 and 672).[6] In late 1979, Sol Spielberg and Jerry Worshaw, an Atlanta real estate developer, contacted Waldman about another investment, the Lancashire Court Apartments in Dekalb County. (R. III, 258-60; R. V, 680-81).

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[5] Unbeknownst to Waldman, the sheriff whom Earl Griffin had supplied as a reference was also involved in the marijuana importation activity in south Florida with Earl Griffin. (R. II 64 and 83-84).

[6] Earl Griffin testified that he continues to receive approximately $40,000 per year from the sales proceeds of the Gainesville property. The shopping center in Newnan, Georgia remains owned in partnership form and continues to produce income for Earl Griffin. (R. II, 92-93)

Georgia Politur invested in this project in a limited partnership with Jerry Worshaw. (R. III, 261-63; R. V, 681-82 and 718; G237).

The accounting firm of Spielberg and Herman prepared the tax returns and did all accounting work for Earl Griffin, PDC Politur, and Georgia Politur. (R. II, 108 and 112-13; R. III, 168 and 195; G128 and G138). Jerry Worshaw, the general partner in the Lancashire Court project, testified that only the accountants, not Waldman, understood the tax issues of the real estate investments. (R. III, 267 and 294-96).

Shortly after he had met Earl Griffin, Waldman received a telephone call from and then met with Mike Griffin, the son of Earl Griffin. (R. IV, 383; R. V, 672). Mike Griffin told Waldman that he also had some funds which he wished to invest in foreign corporations. (R. IV, 383; R. V, 673). Mike Griffin gave Waldman information for a trust through which he desired to provide for his wife and children. (R. V, 674). Mike Griffin did not

tell Waldman the source of these funds, but in fact the money was derived from marijuana importation. (R. IV, 388 and 492). Mr. Wiederkehr, the Liechtenstein attorney retained to organize PDC Politur, was again contacted, and he incorporated two foreign corporations, Schiffhart Holding and Immobilien Grund and Bau ("Immobilien"), and Waldman funded the corporations with money received from Mike Griffin. (R. III, 167; R. V, 673-76; G363). According to Wiederkehr, the stock of Schiffhart Holding and Immobilien was held in trusts, with members of his firm as trustees. (R. III, 167; G363). Again, Waldman referred all accounting work for Mike Griffin and his corporations to the firm of Spielberg and Herman. (R. III, 170 and 194; R. IV, 466; R.V, 667 and 740; G113).

Immobilien purchased property in Florida, referred to as "Mustang Trail", in 1979, for $190,000. (R. IV, 493; R. V, 776; G190). Mike Griffin, under written contract with Immobilien,

supervised extensive renovation work on the Mustang Trail property, and received a salary of $500 per week for his efforts. (R. IV, 495; R. V, 779; G117). After the renovation was completed Mike Griffin had a sign placed on the property offering it for sale. Subsequently, Mike Griffin met with a real estate agent, Mr. Zapack, who was representing the eventual purchasers. When the Mustang Trail property was sold for $500,000, in 1983, Mike Griffin received a commission of $24,500 on the sale and reported this commission on his 1983 tax return. (G199-203).

Shortly before the sale of the Mustang Trail property, Mike Griffin moved to Atlanta and had Waldman form Griffin Investment Corporation, with Griffin as president and his wife as secretary. (R. V, 683; G219). Mike Griffin received a salary in 1983 from Griffin Investment Corporation, which he reported on his tax return. (G185). Again, Spielberg and Herman performed the accounting work and prepared tax returns and W-2 forms for both

Mike Griffin and Griffin Investment Corporation. (R. II, 108; R. IV, 74; R. V, 686; G185 and G186). It was undisputed that Waldman never saw any of these tax returns.

According to Jerry Worshaw, the general partner on the Lancashire Court Apartments project, that investment began to experience problems in the latter part of 1982, when the construction loan became due and interest rates on available financing were high. (R. III, 270). As a result of these problems, the partners decided to convert the apartments to condominiums and to seek new investors. (R. III, 271-72). Waldman contacted Robert Hipple, an Atlanta attorney with experience in international tax matters, about establishing foreign corporations to invest funds in the Lancashire Court Apartments. (R. III, 310). Waldman had previously consulted with Hipple on other client matters when Hipple taught tax and securities law at Emory University School of Law. (R. III, 308-309). Hipple incorporated Glenmont

Real Estate B.V. and Glenmont Investments, N.V. and informed Waldman that the structure wa established. (R. III, 331 and 334). According t Hipple, Glenmont Real Estate B.V. loaned Griffi Investment Corporation $750,000 to invest in th apartment project. (R. II, 131; G138). Griffi Investment Corporation purchased Worshaw's genera partner interest in the Lancashire Court project (R. III, 272-81; G239-G246).

Mike Griffin never told Waldman that his fund had not been previously taxed, and he neve discussed with Waldman any attempt to concea income. (R. IV, 388 and 492; R. V, 688 and 692) The accounting firm of Spielberg and Herma prepared Mike Griffin's tax returns, including th 1983 and 1984 returns that are the subject o Counts Two and Three of the indictment. (R. II 108; G185 and G186). Mike Griffin testified tha he discussed with Ron Herman, and Ron Herman only the process of reviewing his checkbook to determin what items to put on his tax returns. (R. IV, 468)

Moreover, Ron Herman prepared Form W-2s to reflect salary paid to Mike and Susan Griffin by Griffin Investment Corporation. (R. IV, 474). In fact, it is absolutely undisputed that Waldman never saw Mike Griffin's 1983 and 1984 tax returns before the trial of this case. (R. IV, 515; R. V, 692). The 1983 return was signed by Howard Herman, and the 1984 return was signed by Ron Herman. (G185 and G186).

At the conclusion of the Government's case, the Court ruled that the government had not met its burden to prove that Ron Herman, the only member of Spielberg and Herman Accounting firm alleged to be a co-conspirator, was, in fact, a co-conspirator. (R. II, 638).

The case was submitted to the jury after four days of trial. After one and one-half days of deliberation, the jury returned with a verdict of guilty on the three (3) counts.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. THE CONSPIRACY CHARGE IN COUNT ONE OF THE INDICTMENT IS BARRED BY THE FIVE-YEAR STATUTE O LIMITATIONS SET FORTH IN 18 U.S.C. § 3282.

The statute of limitations found in th Internal Revenue Code provides a six-year statut of limitations for certain enumerated offenses, a follows:

> (1) for offenses involving the defrauding o attempting to defraud the United States or an agency thereof, whether by conspiracy or not and in any manner;
>
> * * *
>
> (8) for offenses arising under section 371 o Title 18 of the United States Code, where th object of the conspiracy is to evade or defea any tax or the payment thereof.

26 U.S.C. § 6531 (1) and (8) (emphasis supplied).

The Panel Opinion erroneously held tha subsection (1) provided a six-year statute o limitations for the conspiracy conviction in thi case (to impair and impede the Internal Revenu Service in performing its lawful functions) (Opinion, p. 5241). Contrary to the Opinion

neither subsection (1) nor subsection (8) provide a six-year statute of limitations to the conspiracy conviction in this case.

Initially, it is critical to note that subsection (8) contains the only reference in the statute to conspiracies under 18 U.S.C. § 371. The presence of subsection (8) of 26 U.S.C. § 6531, which contains the only reference in the entire statute to 18 U.S.C. § 371, can only mean that it is the exclusive provision which covers any aspect of the conspiracy statute. If the Panel Opinion, that subsection (1) provides a six-year statute for conspiracies under section 371 were correct, subsection (8) would serve no purpose whatsoever. Ambiguous criminal statutes must be interpreted in favor of the accused. Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056 (1971). Therefore, a Klein conspiracy under 18 U.S.C. § 371 does not obtain a six-year statute of limitations under 26 U.S.C. § 6531(1); it can only obtain a six-year statute under subsection 6531(8).

The conspiracy charge did not obtain a six-year statute under subsection 6531(8) because, contrary to the express statutory language, the purpose of the conspiracy charged herein was not "to evade or defeat any payment of tax or the payment thereof." Although the Indictment charged both prongs of a conspiracy under 18 U.S.C. § 371 ((1) conspiracy to impede and impair the functions of the United States Treasury, and (2) conspiracy to commit an offense against the United States by assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2)), the trial court found that there was not a conspiracy to violate 26 U.S.C. § 7206(2) and did not charge the jury on that prong of the conspiracy. This case was tried and submitted to the jury solely as a conspiracy to impede and impair the United States Treasury, not as a conspiracy to evade tax. The trial court charged the jury that the conspiracy was only to impede and impair the functions of the United States Treasury and not to violate section

7206(2). (R. VI, 902).[7] Nowhere did the trial court instruct the jury that the object of the conspiracy was "to defeat or evade any tax or payment thereof." In fact, as argued later in this brief, the trial court never charged the jury that an element of the charge in this case was the defrauding of the United States. There was no evidence that the object was to defeat or evade any tax. In fact, the testimony of the Government's witness and its response to Waldman's bill of particulars demonstrates that the taxes of Michael and Susan Griffin were overpaid. Further, it is undisputed that neither of the Griffin's ever told Waldman that the monies being invested were untaxed funds nor did they ever tell him when (i.e., in what year) their funds were earned.

Here, the clear reading of 26 U.S.C. § 6531 is that a conspiracy under 18 U.S.C. § 371 is subject to a six-year statute of limitations only if the

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[7] The statute of limitations was clearly critical to the jury determination because the jury asked the Trial Court for an explanation of the statute of limitations.

object of the conspiracy was to evade or defeat an tax. The evidence in this case did not establis such a purpose, and the trial court's instructio went only to impeding and impairing and not to th evasion of tax or even defrauding the Unite States. Therefore, the general five-year statut of limitations under 18 U.S.C. § 3282 applies.

In Grunewald v. United States, 353 U.S. 39 (1957), the Defendant was charged with a conspirac to defraud the United States by impeding an impairing the Internal Revenue Service in violatio of 18 U.S.C. § 371. The evidence showed that th defendants conspired to pay bribes to influence th outcome of certain investigations for suspected ta evasion. The Court addressed the statute o limitations question and determined that th governing section was 18 U.S.C. § 3282, 383 U.S. a 396, note 8. As in Grunewald, the five yea statute set forth in 18 U.S.C. § 3282 should gover in this case.

In this case the Panel Opinion applies a six

year statute of limitation to a § 371 charge. As submitted to the jury this conspiracy had no object to defraud or evade any tax and the Trial Court instructed only impeding and impairing the Internal Revenue Service as an object of the conspiracy and not the defrauding of the United States.

II. THE DECISION OF THE ELEVENTH CIRCUIT AT PAGE 1550 APPLYING THE ANY EVIDENCE STANDARD AND REJECTING PETITIONER'S CLAIM THAT THE GOVERNMENT FAILED TO PROVE AN ESSENTIAL ELEMENT OF THE CHARGED OFFENSE IGNORES THE STANDARDS OF REVIEW FOR SIMILAR CASES SET FORTH BY THE SUPREME COURT IN 1959.

In rejecting petitioner's claim that the government failed to prove all the essential elements of the offenses of a Klein conspiracy and a Tax Return Perjury case, the court relied upon the any evidence standard citing United States v. Hooshmand, 931 F.2d 725, 733 (11th Cir. 1991). Since 1959 this standard has been inapplicable to cases such as petitioner and the Eleventh Circuit has acknowledged such as recently as 1990.

In Ingram v. United States, 360 U.S. 672, 79 S.Ct. 1314 (1959), the Supreme Court specifically

held that a defendant's knowledge of the tax liability must be shown in an 18 U.S.C. § 371 conspiracy to violate provisions of the Internal Revenue Code. Thus, two petitioners had their convictions for violating 18 U.S.C. § 371 overturned even though the evidence established that the two petitioners and two other individuals engaged in a presumably profitable, illegal lottery operation. The Ingram Court held that even though these petitioners might have wanted to evade the tax liability and that they engaged in conduct which could have furthered a plan to evade taxes (if they had known taxes were owed), their activities did not evidence that they knew of tax owed. Ingram, 360 U.S. at 680. Thus, the "any evidence" standard of review was not applicable.

Here, it is undisputed that Waldman did not prepare the Griffins' tax returns, never saw the tax returns, did not furnish information for the returns and was never told by the Griffins when they received the funds or whether those funds were

taxed in previous years. (R.IV, 388 and 492; R.V, 688 and 691). Not only is it undisputed that Waldman was never told that the money had not been taxed, he had every reason to believe that it had been taxed, since it was delivered to Waldman in time-stamped bank wrappers from the Bank of Islamorada, which was the Griffins' hometown. (D10; R.II, 71 and R.V, 663-67). Moreover, Michael Griffin testified that he believed that Waldman believed him to be a rich man. (R.IV, 392). Finally, Waldman was told by the Islamorada police department that Earl Griffin was member of the zoning board for Islamorada and was a respected member of the community. (R.II, 83-84; R.V, 667-68).

United States v. Prichett, 908 F.2d 816 (11th Cir. 1990), citing Ingram v. United States, and specifically rejecting the "any evidence" standard, states that while Circuit Courts of Appeals will review convictions of 18 U.S.C. § 371 in a light most favorable to the government, "(w)hen efforts

at concealment are reasonably explainable in term other than a motivation to evade taxes, th government must offer independent proof that thos who participated in the concealment intended t assist the taxpayer in evading taxes." Prichett 908 F.2d at 821. Accord, United States v Krasovich, 819 F.2d 253 (9th Cir. 1987). Below the Government failed to produce any independen proof that Waldman knew that the Griffins' mone was untaxed or undertaxed in years when it wa admittedly earned. Therefore, Waldman was entitle to directed verdicts of acquittal on all thre counts of the Indictment.

This standard of review is also recognized b the Ninth Circuit Court of Appeals in United State v. Krasovich, 819 F.2d 253 (9th Cir. 1987), wher that Court addressed the evidence required to prov a conspiracy to defraud the United States i violation of 18 U.S.C. § 371. Krasovich wa charged with conspiring to defraud the Interna Revenue Service with respect to the income taxes o

John Drummond. The court stated the evidence as follows:

> John Drummond and his wife, Andrea Drummond were in the cocaine business. Krasovich was their mechanic, servicing and repairing various vehicles for them. In December of 1984, the government arrested the Drummonds and instituted civil forfeiture proceedings against vehicles and earth-moving equipment they allegedly owned. The vehicle that was the subject of . . . the indictment was a used pickup truck purchased several months later, in April,1 1985. Krasovich paid for the truck with money provided by Andrea Drummond. Krasovich registered the truck in his name and later confessed to a drug enforcement agent that he did this so the truck would not be registered in Andrea's name.
>
> The evidence at trial showed that Krasovich knew that the Drummonds were involved in the drug trade. It was also showed that Krasovich had filed false statements with the government claiming ownership of other vehicles and equipment belonging to the Drummonds. There was evidence showing that an Internal Revenue Service agent had previously told Krasovich in connection with those false claims, but not in connection with the pickup truck, that it could be illegal to claim another's property as his own.

819 F.2d at 254.

The court held that this evidence was insufficient to prove that Krasovich intended or agreed with anyone else to impede the Internal

Revenue Service in its collection of taxes. The court held that in order to convict a defendant of a conspiracy to defraud the United States, the government must prove knowledge of the illegal objective of the conspiracy and an agreement with a co-conspirator to pursue that particular objective. In reversing Krasovich's conviction, the court reasoned that:

> Andrea Drummond may have wished to conceal ownership of the truck because she wanted to use it in illegal activities, or because she wanted to avoid drawing attention to herself or her finances, or because she feared seizure of the truck under the forfeiture statute if her ownership became known. This is not a case where efforts at concealment would be reasonably explainable only in terns of motivation to evade taxation. (Citations omitted.) Indeed, the only link between the defendant and the tax laws on the evidence before the jury was a conversation between Krasovich and the IRS agent approximately a month before Krasovich claimed ownership of the pickup truck. In sum, the evidence is not sufficient to show that Krasovich conspired with Andrea Drummond with the objective of interfering with the Internal Revenue Service's collection of John Drummond's taxes, Andrea Drummond's taxes, or any other taxes.

III. THE TRIAL COURT'S FAILURE TO CHARGE AN ESSENTIAL ELEMENT OF THE CONSPIRACY OFFENSE IS REVERSIBLE ERROR.

The language of 18 U.S.C. § 371 clearly specifies that the essential element of the conspiracy offense is "to defraud". There is no mention in 18 U.S.C. § 371 of impeding or impairing. The trial court instructed the jury as to the elements of the conspiracy charge as follows:

> As to Count 1, you will note that defendant is not charged in Count 1 with violating Title 26, 7206(2) rather he is charged with having conspired to impede and impair the lawful functions of the United States Treasury, namely the Internal Revenue Service, in violation of Title 18, The United States Code, Section 371. (R.VI, 901).

The Trial Court then continued on with it charges to the jury concerning conspiracy and never mentioned the defrauding of the United States as an element.

Contrary to the instruction actually given to the jury, the court had previously stated to defense counsel that:

I will charge as to stating the purpose of the

conspiracy will be that language contained i
Count 1 of the Indictment on the first page
starting with 'to defraud the United States'

(R.VI, 836) (emphasis supplied).

The Panel Opinion, page 5243 Footnote 16, hel
that Waldman failed to object when the deficien
conspiracy instruction was given. However
Waldman's counsel did object to the instruction
stating as follows:

(Counsel): We also object to the court'
charge that the defendant conspired - - -

(The Court): Excuse me. Is the door open? g
ahead.

(Counsel): The court's instruction that th
defendant is charged with conspiring to imped
and impair. The law, your honor, we believ
is clear, that the conspiracy must be t
violate a criminal provision such as 7206 an
Mr. Waldman -- the jury must be charged tha
Mr. Waldman needs to evidence the exact sam
intent under the conspiracy charge as i
required under the substantive charges o
Counts 2 and 3. (R.VI, 906) (emphasi
supplied).

Clearly, the trial court's attention wa
adequately drawn to the deficient charge. Th
trial court interrupted counsel at a critical poin
of the objection and bears some responsibility fo

any confusion or lack of specificity of the objection. Counsel then stated to the court that the instruction on conspiring to impede or impair lacked the essential element of an intent to defraud the United States. Much of the entire case had been spent by counsel and the trial court debating whether "impairing and impeding" the I.R.S. alone constituted a violation of 18 U.S.C. § 371. (R.III, 153-54; R.V, 620-21). A man's freedom should not be decided based upon which person the court reporter decided to transcribe. Further, counsel clearly asked the court in the charge conference to charge the element of intent to defraud:

> (The Court): Right, about the purpose I really haven't scratched out the language but I'm going to change - that's going to be the purpose of the conspiracy.
>
> (Mr. Spix): To defraud. (R.VI, 836-37).

CONCLUSION

This case presents significant issues of sufficient importance which require, in resolution, a uniformity only this Court can provide. As to

the statute of limitations governing conspiracie to impair and impede the functions of the Interna Revenue Service, a conflict exists between thi Court and the Fourth, Eighth and Tenth Circui Courts of Appeals [United States v. Lowder, 49 F.2d 953 (4th Cir. 1974); United States v. White 671 F.2d 1126 (8th Cir. 1982); and United States v Brunetti, 615 F.2d 899 (10th Cir. 1980)]. Th conflict should be resolved by this Court.

Additionally, the Eleventh Circuit has faile to follow the clear holding of this Court in Ingra v. United States, supra, by applying the ar evidence standard to its review of convictions fo a Klein conspiracy.

Therefore, petitioner Herbert S. Waldman pray that his Petition for Writ of Certiorari to th Eleventh Circuit be granted.

Respectfully submitted,

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By: _____
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Counsel of Record

APPENDIX "A"

Copy of United States v. Waldman, 941 F.2d 1544 (11th Cir. 1991)

Copy of Order Denying of Rehearing En Banc.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Herbert S. WALDMAN, Defendant-
Appellant.

No. 90-8784.

United States Court of Appeals,
Eleventh Circuit

Sept. 18, 1991.

[941 F.2d 1544 (11th Cir. 1991)]

Defendant was convicted by jury in the United States District Court for the Northern District of Georgia, No. 1:90-cr-103-1, G. Ernest Tidwell, J., of Conspiracy to defraud the United States and to assist in preparation of materially false tax returns, and for primary offenses of assisting in preparation of two false income tax returns as part of alleged money laundering scheme. Defendant appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) six-year statute of limitations governed, and (2) claims of prosecutorial misconduct were meritless.

Affirmed.

1. **Criminal Law (West) 147**

Six-year statute of limitations for offenses arising under Internal Revenue Code involving defrauding or attempting to defraud the United States, not five-year general statute of limitations for noncapital offenses, governed prosecution for conspiracy to defraud the United States by impeding and impairing the Internal Revenue Service (IRS) through concealment of amount and source of another's income and to assist, aid, or counsel the preparation of materially false tax returns. 18 U.S.C.A. §§ 371; 3282; 26 U.S.C.A. §§ 6531(1, 8), 7206(2).

2. **Criminal Law (West) 739(3), 1171.8(1)**

Any alleged prosecutorial misconduct with regard to testimony about defendant's alleged decision to abandon defense of property in forfeiture proceeding was rendered harmless by cross-examination of witness and trial court's curative instruction.

3. **Criminal Law (West) 706(4)**

Government did not wrongfully cross-exami attorney charged with assisting in preparation false income tax returns by soliciting testimo regarding his assertion of attorney-clie privilege on behalf of his client at grant ju proceeding.

4. **Criminal Law (West) 730(1)**

Although prosecutor's statement in closi argument that grand jury consisted of "people ju like yourselves" mischaracterized grand ju process, district court rendered that stateme harmless by carefully circumscribing prosecutor argument and by giving curative instruction.

Jerome J. Froelich, Jr., McKenney & Froelic Mark Spix, Spix, Krupp & Reece, Robert H. Hisho Hishon & Ranne, Dan R. Musick, Atlanta, Ga., f defendant-appellant.

Martin J. Weinstein, Asst. U.S. Atty., U.S. Dept. of Justice, U.S. Attorney's Office, Atlanta, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before JOHNSON and COX, Circuit Judges, and ENGEL*, Senior Circuit Judge.

JOHNSON, Circuit Judge:

Defendant Herbert Waldman appeals his convictions for a conspiracy to defraud the United States and to assist in the preparation of materially false tax returns, and for the primary offenses of assisting in the preparation of two false income tax returns as part of an alleged money laundering scheme. After due consideration, we affirm Waldman's convictions.

*Honorable Albert J. Engel, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.

I. STATEMENT OF THE CASE

A. *Background Facts*

Between 1978 and 1980, Earl Griffin and hi
son, Michael Griffin, illegally imported marijuan
into the United States through the Florida Keys
During this time, Earl Griffin obtaine
approximately $1.5 million from his drug busines
while Michael Griffin received in excess of $1.
million.

Needing a mechanism to launder these proceeds
Earl Griffin was referred to Waldman sometime i
1979 by Gary Beller, an Atlanta real estat
developer. Earl Griffin testified that he tol
Waldman that he possessed a large amount o
undocumented cash which he obtained throug
gambling and that he was looking for legitimat
investments. Earl Griffin testified that Waldman
told him that Waldman could form an off-shor
corporation which would receive Griffi
undocumented money and then send it back to
wholly-owned subsidiary in the United States, a

which time "it would be clean money".[1] Waldman proceeded to establish a Liechtenstein corporation, PDC Politur, and a Georgia subsidiary, Politur Development Corporation ("Georgia Politur").[2] Earl Griffin also testified that Waldman demanded $175,000 in cash as payment for these services and that Waldman provided neither a bill for the services nor a receipt for the cash paid. In addition, Earl Griffin testified that he paid Waldman annual cash fees of around $40,000 for each of the next three years, for which no receipts were furnished. Earl Griffin further testified that, between 1979 and 1980, he transferred over $1 million in cash to Waldman to place in PDC Politur. According to Earl Griffin, Waldman told him never to buy anything in his own name because that would

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[1]Waldman, however, testified that Earl Griffin asked him to form foreign corporations to help him achieve tax savings on income he received as the owner of a major contracting company.

[2]At the time, Liechtenstein law permitted beneficial owners of Liechtenstein corporations to remain secret.

raise a "red flag" to the government. Finall
Earl Griffin testified that, at Waldman
suggestion, Earl Griffin became the President
Georgia Politur for which he received a salary "
make it look legal," yet he performed no servic
for Georgia Politur in exchange for the salary.

Michael Griffin testified that, in 197
sometime after his father became a client
Waldman, he approached Waldman to form forei
corporations to enable him to spend a substanti
amount of cash which he possessed. For Micha
Griffin, Waldman established similar Liechtenste
corporations,[3] Immobilien Grund and B
("Immobilien") and Schiffahrt Holdi
("Schiffahrt"), as well as a Georgia subsidiar
Griffin Investment. Michael Griffin testified th
Waldman charged a setup fee of approximate

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[3]During the grand jury investigation, Micha
Griffin agreed to testify against Waldman as pa
of a plea agreement wherein the government agre
not to indict his wife, Susan Griffin, his fathe
Earl Griffin, and his brother-in-law, Richa
Helton.

$70,000 to $100,000, and subsequent annual fees of approximately $30,000. He further stated that these fees were paid in cash and that Waldman provided no bills or receipts.[4] Michael Griffin testified that he and Waldman discussed how this structure would "clean up" Michael Griffin's money so that purchases could be made in the United States without the Internal Revenue Service ("IRS") knowing that he was the beneficial owner of the things nominally purchased by the off-shore corporation. Michael Griffin also testified that Waldman explicitly advised him not to purchase anything in his own name, because that would raise a "red flag" to the IRS.[5] In keeping with this advice, Waldman arranged for Immobilien to purchase a house in Fort Lauderdale ("the Mustang property") for the benefit of Michael Griffin. Waldman then

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[4]When Waldman transported money overseas for Earl and Michael Griffin, he always took the money in cash form.

[5]Waldman testified that he never discussed hiding income from the IRS with Michael Griffin.

prepared a contract between Immobilien and Micha Griffin whereby Immobilien nominally employ Griffin as the caretaker for the Mustang propert Michael Griffin testified that he was paid $500 p week for t his job, but that he performed services for the salary.[6] Finally, according Michael Griffin, in 1983 Waldman advised him a his wife, Susan Griffin, to draw salaries fr Griffin Investment as President and Vice Presider respectively, to give the appearance of legitimac Michael and Susan Griffin followed that advice, b they never did any work for Griffin Investment.

Both Earl and Michael Griffin testified th Waldman made most of the operational and investme decisions regarding their corporations. Throu Waldman, the Griffins' corporations invested in number of real estate projects in Georgia. T

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[6]Waldman contends that Michael Griffin w employed as a consultant on the reconstruction the Mustang property. It is true that improvemer were made on the Mustang property; however, t record reflects that Michael Griffin's role these improvements was limited to paying for so of the materials and labor.

other partners in tnese real estate projects testified that they dealt solely with Waldman on these investments and that Waldman told them that the foreign corporations represented Swiss doctors and lawyers. Indeed, Earl griffin testified that he once went to the site of one of his investments, an apartment complex, where Waldman introduced him as a potential buyer of one of the apartments, not as a partner in the project. Similarly, Michael Griffin testified that Waldman advised him to conceal his identity when he visited the site of one of his investments.

Waldman testified that he established the foreign corporations relying on the advice of an expert tax accountant, Sol Spielberg, and a lawyer from Liechtenstein, Alex Wiederkehr. Wiederkehr, however, testified that all transactions by PDC Politur, Immobilien, and Schiffahrt were done at the instruction of Waldman. Wiederkehr also stated that all monies repatriated to the United States from these corporations were sent to accounts

controlled by Waldman.

On Waldman's instruction, Michael Griffin hired Sol Spielberg's firm, Spielberg & Herman, to prepare the 1983 and 1984 income tax returns for himself and his wife, Susan. According to the testimony of IRS Agent Joseph Garcia, these tax returns failed to reflect that Michael Griffin was the beneficiary of two foreign trust corporations. The returns also reported some of Michael Griffin's marijuana smuggling proceeds from 1979 as salary income from Griffin Investment in 1983 and as income from real estate commissions and interest in 1983 and 1984.

B. *Procedural History*

On March 23, 1990, a federal grand jury returned an indictment which charged Waldman with three counts relating to money laundering. Count One accused Waldman of conspiring to do two things: (1) defraud the United States by impeding and impairing the IRS through concealment of the amount and source of Michael Griffin's income for 1979,

and (2) assist, aid, or counsel the preparation of materially false tax returns.[7] both in violation of 18 U.S.C.A. § 371.[8] Counts Two and Three alleged that Waldman had committed the substantive offense of willfully assisting or counselling Michael and Susan Griffin in the preparation of their materially false 1983 and 1984 income tax returns in violation of 26 U.S.C.A. § 7206(2).[9] At the close of the government's case, Waldman moved for acquittal, but the district court denied the motion. The jury returned a guilty verdict on all

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[7]This second alleged object of the conspiracy constitutes a violation of 26 U.S.C.A. § 7206(2), the statute involved in the remaining two counts. *See infra* note 9 (text of section 7206(2)).

[8]Section 371 makes it unlawful to "conspire either to commit any offense against the United States, or to defraud the United States . . . in any manner or for any purpose.." 18 U.S.C.A. § 371 (West 1966).

[9]Section 7206(2) states that anyone who "[w]illfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return ... which is ... false as to any material matter" will be guilty of a felony. 26 U.S.C.A. §7206(2) (West 1989).

three counts. The district court sentenced Waldman to three years imprisonment on each count. The court, however, suspended the prison sentences on Counts Two and Three, but placed Waldman on five years probation and fined him $350,000 on those counts.

II. ANALYSIS

Waldman argues that Count One was barred by the applicable statute of limitations and assails portions of the government's questioning and closing argument as prosecutorial misconduct.

A. *Statute of Limitations*

[1] Waldman claims the district court erred in holding that the limitations period applicable to Count One was the six year period provided in 26 U.S.C.A. § 6531.[10] Count One of the indictment

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[10]Section 6531 provides, in pertinent part:

> No person shall be prosecuted ... for any of the various offenses *arising under the internal revenue laws* unless the indictment is found ... within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years --

alleges a conspiracy under 18 U.S.C.A. § 371 with two alternative objects: to defraud the United States and to assist in the preparation of materially false tax returns in violation of 26 U.S.C.A. §7206(2). Waldman contends that the limitations period is five years pursuant to *Grunewald v. United States*, 353 U.S. 391, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957). The Supreme Court, in *Grunewald*, held that the general statute of limitations for non-capital offenses, 18 U.S.C.A. §3282,[11] governed a section 371 conspiracy to fix

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> (1) for offenses involving the defrauding or attempting to defraud the United States ...,whether by conspiracy or not, and in any manner; ... and
> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.
> 26 U.S.C.A. §6531 (West 1989) (emphasis supplied.)

[11]Section 3282 provides: "*Except as otherwise provided*, no person shall be prosecuted ... for any offense, not capital, unless the indictment is found ... within five years next after such offense shall have been committed." 18 U.S.C.A. §3282 (West 1985) (emphasis supplied).

tax fraud trials. *Id.*, at 396 n. 8, 77 S.Ct. at 969 n. 8. Similar results were reached in two Second Circuit cases of the same vintage, *United States v. Witt*, 215 F.2d 580 (2d Cir.), *cert. denied sub nom, Talanker v. United States*, 348 U.S. 887, 75 S.Ct. 207, 99 L.Ed. 697 (1954), and *United States v. Klein*, 247 F.2d 908 (2d Cir.1957), *cert. denied*, 355 U.S. 924, 78 S.Ct. 365, 2 L.Ed.2d 354 (1958).[12] We disagree with appellant's theory and hold that the period of limitations for both the fraud and the section 7206(2) prongs of the conspiracy is six years.

As a preliminary matter, we find that *Grunewald*, *Witt*, and *Klein* do not control this issue. We hereby adopt the reasoning that was first set forth in *United States v. Lowder*, 492 F.2d 953 (4th Cir.), *cert. denied*, 419 U.S. 1092,

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[12]The Second circuit has recently characterized the statute-of limitations holdings in *Grunewald* and in its own cases of *Witt* and *Klein* as "simply pure oversight." *United States v. Ingredient Technology Corp.*, 698 F.2d 88, 99 (2d Cir.), *cert. denied*, 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983).

95 S.Ct. 685, 42 L.Ed.2d 685 (1974), and was developed further in *United States v. Williams*, 649 F.Supp. 1290 (M.D. Fla.1986). Referring to the statute of limitations holdings in *Grunewald* and *Klein*, the *Lowder* court observed:

> [T]he language was not part of the main holdings in either case; it was not with respect to any issue which was fully briefed and pressed; and it seems nothing more than mere inadvertence on the part of both courts that the specific language of §6531, and its predecessors was overlooked.

Lowder, 492 F.2d at 956. The *Williams* court pointed out three additional reasons to believe that the Supreme Court in *Grunewald* was unaware of the predecessor of section 6531. First, the applicable provision (now subsection (8)) was "somewhat submerged in a separate, unnumbered paragraph." *Williams*, 649 F.Supp. at 1292. Second, although the *Grunewald* defendants were charged under section 371, the predecessor of

section 6531(8) referred instead to "section 37 o the Criminal Code," which had been repealed an replaced by section 371. *Id.* Finally, "[t]he mos telling indication that the *Grunewald* cour overlooked the predecessor to [section] 6531 is it failure to cite, let alone distinguish or overrule the prior decision of *Braverman v. United States* 317 U.S. 49 [63 S.Ct. 99, 87 L.Ed. 23] (1942). *Williams*, 649 F.Supp. at 1292.

The *Braverman* court set forth what we believ to be the correct way to interpret section 6531(1 and (8). Subsection (1) applies only to "'offense [arising under the internal revenue laws] involvin the defrauding or attempting to defraud the Unite State.'" *Braverman*, 317 U.S. at 54, 63 S.Ct. a 102 (quoting predecessor to section 6531; curren version uses same language). *See also Unite States v. Scharton*, 285 U.S. 518, 52 S.Ct. 416, 7 L.Ed. 917 (1932); *United States v. McElvain*, 27 U.S. 633, 47 S.Ct. 219, 71 L.Ed. 451 (1926). Wit regard to subsection (8), however, it is no

necessary that the conspiracy have as its object the commission of an offense in which defrauding or attempting to defraud the United States is an element. It is enough that the conspiracy involves an attempt to evade or defeat the payment of federal taxes.[13]

Braverman, 317 U.S. at 55, 63 S.Ct. at 102.

Therefore, we hold that, insofar as Count One charged a conspiracy to defraud the United States

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[13]Some language in subsection (8) ("attempt in any manner to evade or defeat"0 is similar to the operative words of 26 U.S.C.A. § 7201 which makes it unlawful to "*willfully* attempt[:] in any manner to evade any tax." (emphasis added). One could read subsection (8), then, as applying only to conspiracies to violate section 7201; however, we decline to do so for two reasons. First, subsection (8) does not *exactly* track the language of section 7201; subsection (8) omits the word "willfully." More importantly, the only Supreme Court case to fully address the issue, *Braverman*, interpreted what is now subsection (8) more broadly to apply to a conspiracy to violate not section 7201 or its predecessor, but several different *liquor* tax laws. *Braverman*, 317 U.S. at 50 n. 1, 64 S.Ct. at 100 n.1. Therefore, subsection (8) applies to all section 371 conspiracies the object of which is to attempt an offense which, in common parlance, connotes tax evasion unless fraud is a necessary element of the offense. In section 371 tax conspiracies where fraud is a necessary element subsection (1) applies

by impeding the Internal Revenue Service subsection (1) of section 6531 applies; the perio of limitations is six years; and the count is no barred.[14] Several other cases lend support to thi view. *United States v. Ingredient Technolog Corp.*, 698 F.2d 88, 98-99 (2d Cir.1983) (bot subsections (1) and (8) applicable to tax frau conspiracy); *United States v. White*, 671 F.2d 1126 1133-34 (8th Cir. 1982)(same); *United States v Brunetti*, 615 F.2d 899, 901-02 (10th Cir.1980 (same); *United States v. Fruehauf Corp.*, 577 F.2 1038, 1069-70 (6th Cir.)(only subsection (1 applicable to tax fraud conspiracy), *cert. denied* 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978) *United States v. Lowder*, 492 F.2d 953, 955-56 (4t Cir.1974)(same); *United States v. Williams*, 64 F.Supp. 1290, 1291-92 (M.D. Fla.1986)(same a *Ingredient Technology*).

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[14]The grand jury handed down the indictment o March 23, 1990, and the district court properl instructed the jury that, unless they found a overt act after March 24, 1984, Count One wa barred.

We further hold that, insofar as Count One charged a conspiracy to violate Section 7206(2), subsection (8) applies; the period of limitations is six years; and the count is not barred.[15] We find support for this conclusion in two cases. *Braverman*, 317 U.S. at 54-55, 63 S.Ct. at 102 (predecessor to subsection (8) did not require fraud element, just general attempt to evade taxes); *White*, 671 F.2d at 1133-34 (emphasized words, "in any manner," in subsection (8), implying approval of *Braverman* theory of broad applicability of subsection (8) to non-fraudulent tax evasion conspiracies). But *cf. Fruehauf*, 577 F.2d at 1070 (section 7206(2) conspiracy period of limitations either five years, pursuant to 18 U.S.C.A. § 3282, or six years, under section 6531(3) which applies to primary violation of section 7206(2).

B. *Prosecutorial Misconduct.*

Waldman accuses the government of misconduct in three parts of the trial: in the presentation of

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[15]*See supra* note 14.

witness testimony, in its cross-examination o
Waldman himself, and in its closing remarks
First, Waldman contends that the governmen
improperly sought testimony from Jay Solowsk
regarding Waldman's alleged decision to abandon th
defense of the Mustang property in a forfeitur
proceeding. This testimony tended to show tha
Waldman abandoned the property in order to continu
to conceal the connection between Michael Griffi
and the Mustang property. Waldman claims that th
government knew, or should have known, that anothe
lawyer, independent from Waldman, made the decisio
to abandon the property. Second, Waldman argue
that the government wrongfully cross-examined him
soliciting testimony regarding his assertion o
attorney-client privilege on behalf of his client
Earl Griffin, at a grand jury proceeding. Finally
Waldman contends that the government, in it
closing argument, improperly suggested that Waldma
had already been found guilty when it told th
jurors that the grand jury consisted of "peopl

just like yourselves."

In *United States v. Weinstein*, 762 F.2d 1522 (11th Cir.), *modified on other grounds, reh'g denied*, 778 F.d 673 (1985), *cert. denied* 475 U.S. 1110, 106 S.Ct. 1519, 89 L.Ed.2d 917 (1986), this Court held that a successful claim of prosecutorial misconduct requires misconduct "'so pronounced and persistent that it permeates the entire atmosphere of the trial'". *Id.* at 1542 (quoting *United States v. Alanis*, 611 F.2d 123, 126 (5th Cir.), *cert. denied*, 445 U.S. 955, 100 S.Ct. 1607, 63 L.Ed.2d 791 (1980)). Moreover the district court may render misconduct harmless by delivering a curative instruction to the jury. *Id.*

[2] With regard to the first incident, Solowsky's testimony about the forfeiture, the record reflects that, during a colloquy outside the hearing of the jury, Waldman's attorney warned the prosecutor and the court that the forfeiture defense was abandoned not by Waldman but rather by a different and independent attorney then

representing Michael Griffin. After the prosecut assured the court that he believed Solowsky wou testify that it was indeed Waldman who abandon the forfeiture, the court allowed the government call Solowsky. On direct examination, t government established only that Waldman h represented Michael Griffin when Griffin purchas the Mustang property and that Griffin had abandon the forfeiture proceedings; however, the governme never explicitly asked, and Solowsky nev explicitly stated in his direct examination, w represented Griffin at the forfeiture proceeding The direct examination implied that Waldman advis the abandonment. The trial court, however, stru the testimony after cross-examination revealed th the forfeiture was conducted by counsel independe of Waldman. We find that cross-examination and t trial court's curative instruction rendered a alleged misconduct with regard to Solowsky testimony harmless.

[3] Regarding the second incident, t

government's cross-examination of Waldman that elicited testimony revealing Waldman's assertion of attorney-client privilege, we are aware of no court which has equated this privilege with the Fifth Amendment privilege against self-incrimination, and we are not inclined to be the first. "Taking the Fifth" can be explained only as a tactic to conceal one's culpability, such that inherent and incurable prejudice arises. Assertion of attorney-client privilege, however, can be explained on cross-examination and in closing remarks as an attorney's ethical obligation from which no inference of guilt can logically be derived. We, therefore, find no misconduct in the elicitation of Solowsky's testimony regarding Waldman's assertion of attorney-client privilege.

[4] Finally, we believe the government's reference to the grand jury during its closing must be taken in context. By the reference, the government sought to refute the defense's implication that the government had manipulated the

evidence. The reference to the grand jury was indeed inapt and certainly carried with it the possibility of prejudice. The district court, however, quickly and effectively rendered harmless the government's mischaracterization of the grand jury process by carefully circumscribing the prosecutor's argument and by giving a curative instruction. We therefore find all of Waldman's claims of prosecutorial misconduct meritless.[16]

III. CONCLUSION

For the foregoing reasons, we AFFIRM Waldman's convictions.

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[16]Waldman raised two other grounds for reversal before this Court. First, Waldman claims that the government's evidence of willfulness was insufficient to support the verdict on Counts Two and Three. We find this argument meritless. See *United States v. Hooshmand, 931.*

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-8784

HERBERT S. WALDMAN,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

On Appeal from the United States District Court

for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion September 18, 1991, 11th Cir. 19__, ___F.2d).

Before: JOHNSON and COX, Circuit Judges, and ENGEL*, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

S/Emmett R. Cox, United States District Judge

*Hon. Albert J. Engel, Sr. U.S. Circuit Judge for the Sixth Circuit, sitting by designation

CERTIFICATE OF SERVICE

This is to certify that I have caused a copy of a copy Petition for Writ of Certiorari to the United States Court of Appeals, for the Eleventh Circuit (as corrected), to be served upon counsel of record by placing same in the United States mail, first class postage prepaid, addressed as follows:

Honorable Kenneth Starr
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

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This 19th day of February, 1992.

Mark V. Spix
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